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17

18 **UNITED STATES DISTRICT COURT**

19 **DISTRICT OF NEVADA**

20 PURE PARLAY, LLC a Nevada Limited
21 Liability Company,

22 Plaintiff,

23 v.

24 STADIUM TECHNOLOGY GROUP,
INC., a Nevada Corporation, and GVC
25 HOLDINGS, PLC, a company incorporated
in the Isle of Man,

26 Defendants.

Case No. 2:19-cv-00834-GMN-BNW

27
28 **DEFENDANTS' RULE 12(c) REPLY
MOTION FOR JUDGMENT ON THE
PLEADINGS**

1 Defendants Stadium Technology Group, Inc. and GVC Holdings plc (now known as Entain
 2 plc) (collectively “Defendants”), by and through their undersigned attorneys, respectfully file this
 3 Reply in support of Defendants’ Rule 12(c) Motion for Judgment on the Pleadings (Dkt. # 74)
 4 (herein “Motion”).

5 **I. INTRODUCTION**

6 The issue before the Court—whether to permit this case to proceed on allegations of
 7 infringement of a facially invalid patent—is not unique. Indeed Courts in this District and
 8 elsewhere routinely resolve patent eligibility issues at the pleadings stage and often do so by
 9 dismissing a case. It does not matter that the Court has not yet engaged in claim construction;
 10 Plaintiff unsurprisingly fails to identify even a single term it contends requires construction. It
 11 does not matter that there is no factual record; Plaintiff identifies no facts obtainable through
 12 discovery that would bear on patent eligibility. It does not matter that a single examiner at the
 13 U.S. Patent and Trademark Office (“USPTO”) allowed this patent to be granted; it is the purview
 14 of the Court to determine whether the subject matter claimed is ultimately permissible.

15 Even if the Court were to adopt Plaintiff’s description of the ’382 Patent’s subject matter,
 16 the Court should still find that its claims are directed to an abstract idea. As the Federal Circuit
 17 explained in *Core Wireless Licensing S.A.R.L. v. LG Elecs. Inc. et al.*, which Plaintiff cited but
 18 otherwise ignores in relevant part, courts in cases involving computer-implemented claims inquire
 19 “whether the claims are directed to a specific improvement in the capabilities of computing
 20 devices” to determine whether the subject matter is directed to an abstract idea.¹ Plaintiff makes
 21 no such assertion, nor could it.

22 And, regardless of whether the Court adopts Plaintiff’s or Defendants’ characterization of
 23 the abstract idea, Plaintiff articulates no inventive concept that could save the asserted claims.
 24 Instead, Plaintiff distorts the analysis by conflating novelty and non-obviousness with patent-
 25 eligibility to create the illusion that innovation in ineligible subject matter alone is sufficient to
 26
 27

28 ¹ See *Core Wireless Licensing S.A.R.L. v. LG Elecs. Inc. et al.*, 880 F.3d 1356, 1361 (Fed. Cir. 2018).

1 meet the “inventive concept” requirement.² It is not. Critically, Plaintiff neither rebuts
 2 Defendants’ assertion that the asserted claims merely invoke conventional components for their
 3 conventional use nor identifies any aspect of the asserted claims that are directed to an
 4 improvement in the functioning of a computer.

5 Put succinctly, there is no reasonable basis to permit the ’382 Patent to survive another
 6 day. The ’382 Patent should have never been granted in the first place. No amount of discovery
 7 or claim construction would alter that reality. If such factual issues existed, it was incumbent on
 8 Plaintiff to identify them. Plaintiff did not. Defendants should not be forced to expend additional
 9 resources defending against these dubious claims any further.

10 **II. NOT ALL GAMING RELATED PATENTS ARE INVALID BUT THE ‘382 11 PATENT IS**

12 Plaintiff accuses Defendants of attempting to “create the perception that any gaming related
 13 subject matter is patent ineligible.” Dkt. # 77 (“Response”), 5. That is not the case. Defendants
 14 arguments regarding patent-eligibility are directed to the ’382 Patent, not the industry-at-large.

15 It is certainly true that the USPTO continues to find subject matter in the gaming arts to be
 16 patent eligible and that Courts have stated that inventions in the gaming arts are not necessarily
 17 foreclosed from patent protection. *Id.* But, there is important context regarding these statements
 18 that Plaintiff has not addressed.

19 *First*, while Courts have stated that inventions in the gaming arts are not necessarily
 20 foreclosed from patent protection under § 101, the types of inventions that Courts have posited
 21 might pass muster are distinct from the claims at issue in this case. For example, while Plaintiff
 22 cites to *In re Marco Guldenaar Holdings B.V.* for this general proposition, it is worth noting that
 23 the Federal Circuit held that the wagering patent-at-issue in that case was invalid under § 101. *See*

24 ² For example, Plaintiff repeatedly refers to the claimed invention as, among other things, a “novel advance over the
 25 prior art” (Response, 3), referring to the claimed wagering rules as not previously existing (Response, 8), etc. Yet
 26 novelty and non-obviousness do not bear on whether the claims are directed to patent-eligible subject matter. *See*
 27 *Two-Way Media Ltd. v. Comcast Cable Commc’n’s, LLC*, 874 F.3d 1329, 1336 (Fed. Cir. 2017) (“The novelty and
 28 nonobviousness of the claims under [35 U.S.C.] §§ 102 and 103 does not bear on whether the claims are directed to
 patent-eligible subject matter under § 101.”).

1 Response, 5 (citing 911 F.3d 1157 (Fed. Cir. 2018)). The Court came to this conclusion despite
 2 the fact that, unlike here, the wagering game at issue in *In re Marco* utilized allegedly
 3 unconventional and “specifically-claimed dice” as opposed to generic computing components. *In*
 4 *re Marco*, 911 F.3d at 1160-61.

5 Relatedly, the general proposition expressed in *In re Marco* that patents in the gaming arts
 6 are not necessarily foreclosed upon was adopted from *In re Smith*, another Federal Circuit case
 7 analyzing—and ultimately invalidating—a wagering patent. *Id.* at 1162 (citing *In re Smith*, 815
 8 F.3d 816, 819 (Fed. Cir. 2016)). There, the Federal Circuit presented an example of the types of
 9 claims in the gaming arts that might pass muster; namely, those that are “directed to conducting a
 10 game using *a new or original deck of cards*.” *In re Smith*, 815 F.3d at 819.³ Unlike the example
 11 provided in *In re Smith*, there is nothing within the four corners of the ’382 Patent that discusses,
 12 let alone claims, using new or original components.

13 *Second*, Plaintiff does not identify a single case in this District upholding the validity of
 14 claims directed to gaming arts that are implemented on a generic computing device, such as the
 15 ’382 Patent. Instead, Plaintiff cites only to *CG Tech. Dev., LLC v. Big Fish Games, Inc*, which
 16 involved a claim directed to a gaming controller—not a game. *CG Tech. Dev., LLC v. Big Fish*
 17 *Games, Inc.*, No. 2:16-cv-00857-RCJ-VCF, 2016 WL 4521682, at *10 (D. Nev. Aug. 29, 2016).

18 As the Court in *CG Tech.*, explained:

19 Claim 20 is not directed simply to authorizing access to a game based on age but to
 20 carrying out that purpose by using an arrangement of particularized computer
 21 components to implement an apparatus that never existed prior to November 1997:
 22 a video-game system with a wireless, personalized game controller. In other words,
 the claim has physical and tangible components that are directed to more than
 performance of an abstract idea.

23 *Id.* (internal quotations and citations omitted). The wireless controller claim at issue in *CG Tech.*
 24 is distinguishable from the wagering claims at issue here. Unlike the wagering claims of the ’382
 25 Patent, which are method claims implemented on generic computing components, Claim 20 of the
 26 patent-at-issue in *CG Tech.* was an apparatus claim directed to a purportedly new piece of physical
 27

28 ³ Emphases added unless otherwise noted.

1 technology. *Id.*

2 Third, it does not matter that the USPTO continues to find certain subject matter in the
 3 gaming arts patent-eligible.⁴ The Federal Circuit has repeatedly re-affirmed that the USPTO's
 4 Patent Eligibility guidance lacks judicial authority. *See, e.g., cxLoyalty, Inc. v. Maritz Holdings*
 5 *Inc.*, 986 F.3d 1367, 1376 (Fed. Cir. 2021). And, it is indisputable that assessing the validity of
 6 issued patents is within the purview of the Court. To the extent an examiner allowed a patent to
 7 issue that contradicts established subject matter eligibility precedent, such as the '382 Patent, the
 8 Court is on sturdy ground to invalidate it, even at the pleadings stage. *See, e.g., buySAFE, Inc. v.*
 9 *Google, Inc.*, 765 F.3d 1350, 1352-55 (Fed. Cir. 2014) (affirming the lower court's grant of
 10 judgment on the pleadings based on Section 101); *Curb Mobility, LLC v. Kaptyn, Inc.*, 434 F.
 11 Supp. 3d 854, 857-58 (D. Nev. 2020) (granting motion for judgment on the pleadings on Section
 12 101 grounds); *Relevant Holdgs., LLC v. MindGeek USA Inc., et al.*, No. 2:21-cv-03174, 2021 U.S.
 13 Dist. LEXIS 164331 at *10, *21 (C.D. Cal. Aug. 30, 2021) (invalidating patents at pleadings stage
 14 under 35 U.S.C. §101 despite patents having overcome patent-eligibility challenge at the USPTO).

15 **III. PLAINTIFF FAILS TO REBUT THE REALITY THAT THE CLAIMS OF THE**
'382 PATENT ARE DIRECTED TO A PATENT INELIGIBLE ABSTRACT IDEA

16 Defendants contend that the asserted '382 Patent claims are directed to managing a multi-
 17 game sports wager. *See Motion*, 6. Plaintiff proposes an alternative characterization—that the
 18 asserted claims are directed to “improvements in wagering technology, namely, a method for
 19 increasing wagering flexibility to an individual bettor in the process of making a multiple armed
 20 wager from an electronic wager input device (e.g., mobile smart phone) having a display.” *See*
 21 *Response*, 3. This is a distinction without a difference—both characterizations are directed to
 22 patent-ineligible abstract ideas and both render the patent invalid.

23 In support of its position, Plaintiff posits that the Court should be instructed by the Federal
 24 Circuit's decision in *Core Wireless*. *See Response*, 6 (“[A] more relevant case to the one at hand

26 ⁴ Plaintiff relies on the Patent Trial and Appeal Board's decision in *Ex Parte Berndt Burghard* to support this
 27 proposition. *Response*, 5, n. 5 (citing Dkt. # 77-3). However, the claims at issue therein are distinguishable from the
 28 '382 Patent. The claims at issue in *Ex Parte Berndt Burghard* are apparatus claims directed to a specific gaming
 machine, not method claims implemented on generic computing devices. *See, e.g.*, Ex. 3, 14 (“Claim 1, as a machine
 claim, recites one of the enumerated categories of eligible subject matter in 35 U.S.C. § 101.”).

1 involves the Court's analysis of an improved user interface for small screens such as a mobile
 2 device where the claims were found not directed to an abstract idea.”). Defendants agree.

3 The Federal Circuit in *Core Wireless* explained that in determining whether subject matter
 4 was directed to a patent-ineligible abstract idea, the Court should ask “whether the claims are
 5 directed to a specific improvement in the capabilities of computing devices[.]” *Core Wireless*, 880
 6 F.3d at 1361. In *Core Wireless*, the Court held that the asserted patent was directed to a specific
 7 improvement in the capabilities of computing devices because “[t]he disclosed invention *improves*
 8 *the efficiency of using the electronic device* by bringing together a limited list of common functions
 9 and commonly accessed stored data, which can be accessed directly from the main menu.” *Id.* at
 10 1363 (internal quotations and citations omitted). The Federal Circuit in *Core Wireless* likened the
 11 patent-at-issue to those in *Enfish*, *Thales*, *Visual Memory*, and *Finjan*, which dealt with patents
 12 directed to “a specific improvement to the way computers operate[,]”⁵ the use of “inertial sensors
 13 in a non-conventional manner to reduce errors in measuring the relative position and orientation
 14 of a moving object on a moving reference frame[,]”⁶ “enhanc[ing] computer memory
 15 system[s][,]”⁷ and “behavioral-based” virus scanning,⁸ respectively. *See id.* at 1361–63.

16 Plaintiff has not—nor can it—factually contend that the ’382 Patent, under either
 17 characterization, is directed to an improvement in the capabilities of computing devices, as the
 18 Federal Circuit instructs. The closest Plaintiff gets to making this assertion is in its discussion of
 19 Step Two under the *Alice* framework where it asserts that “the claimed method is not using a
 20 computer as a mere tool to facilitate an abstract idea but is instead recites a specific asserted
 21 improvement in computer capabilities (i.e., accepting wagers based on a bettor’s input (e.g.,
 22 manipulating the lines or point spreads and generating corresponding payouts).” Response, 9. But
 23

24 ⁵ *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016) (holding that the disclosed technique enabled
 faster searching and more effective storage of data than previous methods).

25 ⁶ *Thales Visionix Inc. v. United States*, 850 F.3d 1343, 1348 (Fed. Cir. 2017) (holding that the disclosed technique
 enabled sensors to more efficiently track an object on a moving platform).

26 ⁷ *Visual Memory LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1259 (Fed. Cir. 2017) (holding that the disclosed technique
 of “us[ing] [] programmable operational characteristics that are configurable based on the type of processor” enhanced
 computer memory).

28 ⁸ *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1304-05 (Fed. Cir. 2018) (holding that the disclosed virus
 scanning technique improved computer functionality).

1 Plaintiff makes this statement without factual or legal basis. In fact, Plaintiff does not cite to a
 2 single portion of the '382 Patent for support. And, Claim 1 of the '382 Patent unambiguously
 3 states that it is a “computer-implemented method *for providing increased wagering flexibility*”—
 4 not a computer-implemented method to improve computer functionality by, *e.g.*, providing for
 5 faster searching and more effective storage, or enhancing memory, or generating user-interfaces
 6 more suitable for decreasing screen sizes.

7 Even adopting Plaintiff’s characterization of the patented subject matter, “improving
 8 wagering technology” does not pass muster. Increasing wagering flexibility does not improve the
 9 functioning of a computer. And if it did, it was incumbent on Plaintiff to give some indication as
 10 to how in the Patent itself and also in its Response.

11 For the reasons discussed above and in Defendants’ Motion, the Court should hold that the
 12 claims of the '382 Patent are directed to an abstract idea under either Plaintiff or Defendants’
 13 characterization.

14 **IV. PLAINTIFF FAILS TO RECITE A SUFFICIENT INVENTIVE CONCEPT IN
 15 THE APPLICATION OF THE ABSTRACT IDEA TO SAVE ITS PATENT**

16 The proper focus under Step Two of the *Alice* framework is whether there is an inventive
 17 concept “*in the application* of the ineligible matter to which . . . the claim is directed.” *Trading*
 18 *Techs. Int’l, Inc. v. IBG LLC*, 921 F.3d 1378, 1385 (Fed. Cir. 2019) (ellipsis in original) (citation
 19 omitted). And, with respect to computer-implemented claims, whether the generic computing
 20 components *themselves* are used in non-conventional ways. *Content Extraction & Transmission*
 21 *LLC v. Wells Fargo Bank, Nat. Ass’n*, 776 F.3d 1343, 1347–48 (Fed. Cir. 2014) (“For the role of
 22 a computer in a computer-implemented invention to be deemed meaningful in the context of this
 23 analysis, it must involve more than performance of well-understood, routine, [and] conventional
 24 activities previously known to the industry.” (quoting *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*,
 25 573 U.S. 208, 225 (2014))). Plaintiff presents no arguments addressing these issues.

26 Instead, Plaintiff mistakenly focuses its Response on whether the claims are novel under §
 27 102 and/or non-obvious under § 103. For example, instead of addressing whether the claims
 28 invoke unconventional components or conventional components for unconventional uses, Plaintiff

1 argues that performing the method steps of the asserted claims were “not possible because it did
 2 not exist” (*i.e.*, novelty) (Response, 8), that the independent claim *itself* was not conventional (*i.e.*,
 3 obviousness) (Response, 6-9), and that the claims present a “specific (and better) way of solving
 4 an identified problem associated with a bettor’s lack of control and input over multiple team
 5 wagering options” (*i.e.*, obviousness) (Response, 9).^{9,10} But, the Federal Circuit confirms that the
 6 novelty and nonobviousness of claims under 35 U.S.C. §§ 102 and 103 does not bear on whether
 7 the claims are directed to patent-eligible subject matter under § 101. *See Two-Way Media Ltd.*,
 8 874 F.3d 1329, 1336, 39-40 (Fed. Cir. 2017) (“We find no error in the district court’s determination
 9 to reject Two-Way Media’s proffered material, as the court correctly concluded that the material
 10 was relevant to a novelty and obviousness analysis, and not whether the claims were directed to
 11 eligible subject matter.”).

12 Plaintiff’s approach is unsurprising as Defendants anticipated that instead of addressing
 13 whether there is an inventive concept in the application of the ineligible matter, as required,
 14 Plaintiff would argue that the inventive concept is found within the purported innovation to the
 15 wagering structure itself. Motion, 10. That is not the proper standard. Indeed, the Federal Circuit
 16 has cautioned courts not to conflate allegedly innovative abstract ideas with the requisite
 17 “innovation in the non-abstract application realm.” *See SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d
 18 1161, 1163 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2747 (2019). In particular, claims are still
 19 found to be ineligible when “their innovation is an innovation in ineligible subject matter.” *Id.*
 20 This is precisely the situation here (at best). In other words, even if Plaintiff’s characterization is
 21 correct, its claims still cover an innovation within ineligible subject matter and that patent remains
 22 invalid.

23 In sum, the claims of the ’382 Patent are directed to a patent-ineligible abstract idea and
 24

25 ⁹ Plaintiff cites to *Visual Memory LLC v. NVIDIA Corp.* to support this proposition. However, the Court in *Visual*
 26 *Memory* did not address Step Two of the *Alice* framework. 867 F.3d 1253, 1262 (Fed. Cir. 2017) (“Because we
 27 conclude that the claims of the ’740 patent are not directed to an abstract idea, we need not proceed to step two of the
Alice test.”). Thus, *Visual Memory* is inapposite.

28 ¹⁰ Plaintiff likewise presents a table with the heading “Relevant Limitations Directed to Inventive Concept” that merely
 parrots the claim language without any further explanation. This is precisely the type of unsupported attorney
 argument that the Court can and should ignore.

1 lack an inventive concept sufficient to transform the claims into a patent-eligible invention.
2 Plaintiff presented no meaningful argument to the contrary, or otherwise identified factual disputes
3 that would preclude granting Defendants' Motion. Thus, every claim of the '382 Patent is invalid
4 under 35 U.S.C. § 101.

5 **V. CONCLUSION**

6 For all of the foregoing reasons, as well as those reasons articulated in its Motion,
7 Defendants respectfully request that the Court grant judgment on the pleadings that the claims of
8 the '382 Patent are invalid under 35 U.S.C. § 101 and dismiss this case in its entirety with
9 prejudice.

10 DATED this 3rd day of December 2021.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 3rd day of December 2021, a copy of **DEFENDANTS' REPLY RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS** was served electronically to all parties of interest through the Court's CM/ECF system as follows:

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